Mediating Mediations: Protecting the Homeowner's Right to Self-Determination in Foreclosure Mediation Programs

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In the wake of the subprime mortgage crisis, homeowners across the nation have found themselves faced with foreclosure proceedings and the risk of losing their homes. In response to the inundation of foreclosure cases and to the threats posed to homeowners, lenders, and communities alike by high foreclosure rates, several jurisdictions have implemented so-called mediation programs as a means of encouraging homeowners and lenders to come to agreements in order to avoid mortgage foreclosures. But can these programs deliver on the promises of mediation as a form of dispute resolution? This Note provides an overview of the types of foreclosure mediation programs that have been implemented and explores the implications of calling these programs "mediations." Approaching foreclosure mediation in light of the relative positions of both the homeowner and lender within the legal system in the long term, this Note identifies a set of key process protections that foreclosure mediation programs should prioritize in order to safeguard the homeowner's right to self-determination — a core feature of mediation — thereby working to ensure that these programs stay true to mediation's aims.

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I. INTRODUCTION

The subprime mortgage crisis has dramatically affected homeowners throughout the nation. In its wake, millions of homeowners have already faced mortgage foreclosures, and it is widely estimated that there are millions more yet to come.[1] Credit Suisse projects that sixteen percent of all mortgages will be in foreclosure by the year 2012, totaling 8.1 million foreclosures across the United States.[2] This projection represents a staggering increase in foreclosure rates compared to periods prior to the crisis. In fact, the number of foreclosures reported in 2008 indicates an 81% increase over the number reported in 2007, and a 225% increase over that in 2006.[3] It has been estimated preliminarily that the number of foreclosures in 2010 will hit a record high for the fourth year in a row, with over 3.5 million new foreclosures predicted.[4]

The rise in mortgage foreclosures carries with it negative consequences for homeowners, communities, and lenders alike. For homeowners, foreclosure "can ruin their credit for years, adversely affect their jobs and children's schooling, and take away what for many Americans is their principal investment opportunity and chance to get ahead."[5] Beyond the effects on these individuals' lives, however, the volume of foreclosures creates additional problems. The foreclosure of one home causes neighboring property values to decline.[6] Severe decreases in property values lead

1. Foreclosure enables a lender to repossess or obtain judicial sale of real property when the mortgagor defaults on his payments, thereby terminating the homeowner-borrower's interest in the property. The laws governing foreclosure differ by state. This Note examines one aspect of foreclosure laws' recent evolution.

2. ROD DUBITSKY ET AL., CREDIT SUISSE, FORECLOSURE UPDATE: OVER 8 MILLION FORECLOSURES EXPECTED 1 (2008), http://www.chapa.org/pdf/ForeclosureUpdateCreditSuisse.pdf.

3. Press Release, RealtyTrac Inc., Foreclosure Activity Increases 81 Percent in 2008 (Jan. 15, 2009), http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=5681&accnt=64847.

4. Rick Sharga, *New Year, New Opportunities*, REALTYTRAC NEWS & OPINIONS, Jan. 7, 2010, http://www.realtytrac.com/contentmanagement/realtytraclibrary.aspx?channelid=8&accnt=0&itemid=8331.

5. PEW CHARITABLE TRUSTS, DEFAULTING ON THE DREAM: STATES RESPOND TO AMERICA'S FORECLOSURE CRISIS 11 (2008), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Subprime_mortgages/defaulting_on_the_dream.pdf.

6. "Close to 41 million homes across the nation are projected to decline in value by an average of $8,800 because of subprime foreclosures that take place nearby." *Id.* at 12

to corresponding losses in a community's tax base,[7] meaning "less money for schools, public safety, and other key services."[8] In addition, homes that are foreclosed upon often remain vacant, which can attract crime and create other neighborhood problems.[9] Even lenders themselves lose in periods of high foreclosure rates because houses sell for far below market value, and because the cost of maintaining unsold properties is high.[10]

In the face of these far-reaching negative effects, many jurisdictions — from individual court districts to entire states — have implemented programs encouraging direct contact between borrowers and lenders in an attempt to "ameliorate the deleterious effects [of foreclosures] on the state economy and local economies."[11] These programs, over 25 in all, represent a diverse set of arrangements whose features vary widely.[12] Despite this variety, however, the current dialogue around these programs groups them all together under the label of "mediation programs." The American Bar Association, for example, has compiled a list of "Residential Foreclosure Mediation Sources," many of which do not involve a mediator at all.[13] Similarly, the National Consumer Law Center released a report entitled "State and Local Foreclosure Mediation Programs: Can They Save Homes?" that treats a diverse spectrum of programs under the same analysis.[14] Accord-

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(citing CENTER FOR RESPONSIBLE LENDING, SUBPRIME SPILLOVER: FORECLOSURES COST NEIGHBORS $202 BILLION; 40.6 MILLION HOMES LOSE $5,000 ON AVERAGE (2008), *available at* http://www.responsiblelending.org/mortgage-lending/research-analysis/subprime-spillover.pdf).

7. *Id.*; *see also id.* at 10 (listing the foreclosure-caused decrease in each state's tax base).

8. S.B. 1137, 2008 Leg. (Cal. 2008), 2008 Cal. Legis. Serv. 69 (West).

9. PEW CHARITABLE TRUSTS, *supra* note 5, at 12.

10. *Id.* at 11–12; *see also* discussion *infra* Part II.A.

11. Cal. S.B. 1137.

12. GEOFFRY WALSH, NATIONAL CONSUMER LAW CENTER, STATE AND LOCAL FORECLOSURE MEDIATION PROGRAMS: CAN THEY SAVE HOMES? iv (2009) [hereinafter NCLC REPORT], *available at* http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-mediation-programs.pdf.

13. American Bar Association, Residential Foreclosure Mediation Sources for ADR Professionals, http://www.abanet.org/dispute/mediation/resources.html (last visited July 25, 2010).

14. NCLC REPORT, *supra* note 12. *See also* ANDREW JAKABOVICS & ALON COHEN, CENTER FOR AMERICAN PROGRESS, IT'S TIME WE TALKED: MANDATORY MEDIATION IN THE FORECLOSURE PROCESS 7 (2009), *available at* http://www.americanprogress.org/issues/2009/06/pdf/foreclosure_mediation.pdf.

ing to these sources,[15] "foreclosure mediation programs" have been launched in over 15 states since 2007.[16]

These programs have garnered wide attention since their implementation and have been met with mixed responses. In August 2009, the American Bar Association adopted a resolution in support of "federal, state or territorial legislation, regulations, or court rules that promote the use of mediation to assist in resolving disputes that could lead to foreclosure of mortgages on residential property."[17] While some programs have received public accolades,[18] they are not without their critics. In particular, opponents have expressed concern that the new programs may simply create additional steps in the foreclosure process, increasing costs and forcing lenders "to keep the defaulted loans on their books for longer."[19] Yet given the fact that "none of the 25 existing foreclosure mediation programs has offered any concrete data on the nature of the outcomes it has achieved,"[20] an overall evaluation of their outcomes is currently impossible.

This Note undertakes a process-oriented rather than an outcome-oriented approach to evaluating the purported foreclosure mediation programs. Viewing foreclosure mediations through Marc Galanter's framework illuminating systemic disparities in the legal system in the long term,[21] this Note identifies points of leverage that foreclosure mediation programs can exploit to protect the homeowner's right to self-determination, thereby preserving a core aim of mediation as a form of dispute resolution. Through doing so, this Note seeks to contribute to the contemporary dialogue promoting a meaningful role for mediation in meeting society's diverse dispute resolution demands.

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15. The goal of this Note is not to criticize these sources, which certainly provide useful information, perspectives, and analyses. Rather, this Note seeks to provide different criteria for framing and analyzing these programs.

16. NCLC REPORT, *supra* note 12, at iv; *see also* AMERICAN BAR ASS'N, RECOMMENDATION NO. 300 2 (2009) ("[I]n December 2007, the Supreme Court of Ohio began creating the first statewide court mediation foreclosure program."), *available at* http://www.abanet.org/leadership/2009/annual/daily_journal/Three_Hundred.doc.

17. AMERICAN BAR ASS'N, RECOMMENDATION NO. 300, *supra* note 16.

18. *See, e.g.*, Ayana Jones, *Foreclosure Prevention Program Praised*, PHILA. TRIBUNE, Dec. 15, 2009, at 3B.

19. *See, e.g.*, Nicholas Sohr, *Md. Regulators Want Tougher Foreclosure Rules*, THE DAILY REC. (Baltimore), Dec. 10, 2009; John G. Edwards, *Mediation Plan Blamed for Delays*, LAS VEGAS REV.-J., Oct. 14, 2009, at D1.

20. NCLC REPORT, *supra* note 12, at 6.

21. *See* discussion *infra* Part IV.A.

In order to do this, Part II identifies which of the recently established programs fall within the definition of "mediation" as understood within the field based on their structural components. Part III discusses the difficulties involved in classifying these programs as mediations, rather than as judicial settlement conferences, and argues that it is necessary to maintain the distinction between the two forms of dispute resolution through protecting the homeowner's right to self-determination. Finally, Part IV identifies and discusses the following points of leverage for protecting the homeowner's right to self-determination in the foreclosure mediation process: (1) maximizing the homeowner's agency in determining the parameters under which she participates in mediation; (2) providing a means whereby the homeowner can receive a legal evaluation prior to the mediation and by somebody other than the mediator; (3) requiring that lenders provide information to homeowners outlining the bounds of the financial issues; and (4) ensuring that homeowners are assisted in obtaining and interpreting the information that will be essential to the mediation process. By enhancing mechanisms to exploit these points of leverage, these programs can work toward maintaining the distinction between foreclosure mediation programs and judicial settlement conferences that is fundamental to preserving the unique values of mediation as a form of dispute resolution.[22]

II. DEFINING THE SCOPE: MEDIATION AS FACILITATED NEGOTIATION

The current dialogue surrounding foreclosure mediation programs groups together a disparate set of programs under the umbrella of "mediation."[23] Despite the diversity within this set, the sources currently addressing the issue provide evaluations of and

22. This Note does not suggest that there is one specific model of mediation programs that is the "true" mediation model. Instead, the goal of this Note is to identify ways to push the so-called foreclosure mediation programs toward the core of mediation in order to avoid the loss of mediation's unique value. The importance of this conceptual move is developed *infra* Part III.D. Thus the goal of this Note is not to categorize the individual programs as either "mediation" or "settlement conference" but rather to articulate iterative standards by which the foreclosure mediation programs can retain a core quality of mediation.

23. *See supra* notes 12–14.

recommendations for these programs as a whole.[24] While such commentary can provide a useful overview and starting point for analysis of the programs, many of the programs covered do not fall within the scope of mediation as understood by the legal community. This section provides an overview of the spectrum of programs that have been grouped together and uses a preliminary standard to divide them into two categories: those that cannot be classified as mediation, which will be excluded from further analysis, and those that fit within the fundamental legal framework of mediation, to which the subsequent analysis applies. The preliminary standard applied is the one set forth by the Model Standards of Conduct for Mediators promulgated by the American Bar Association, which state that "[m]ediation is a process in which an impartial third party facilitates communication and negotiations and promotes voluntary decision making by the parties to the dispute."[25] Thus the presence of a neutral third party distinguishes the two types of programs at this stage.

A. UNDERSTANDING LENDER-HOMEOWNER NEGOTIATION

Underlying all of these programs is an assumption that both lenders and borrowers stand to gain from direct negotiations, thereby allowing the parties to reach an agreement outside of the foreclosure process. Empirical evidence supports this assumption. Loan modifications — through strategies such as interest rate reduction,[26] extension of the amortization period for the loan term,[27] deferral of a portion of the principal until the maturity of

24. *See, e.g.*, NCLC REPORT, *supra* note 12, at 1 ("Foreclosure mediation programs have come in many forms. . . . In some programs courts refer residential foreclosures to the court's existing alternative dispute resolution system . . . . Other programs provide a special court-supervised settlement conference for parties to a foreclosure. Some programs do not involve formal mediation or mediators at all. Instead, they merely direct mortgage servicers to contact homeowners to discuss settlement options before the servicers proceed with foreclosures.").

25. AMERICAN BAR ASS'N, MODEL STANDARDS OF CONDUCT FOR MEDIATORS 2 (2005), *available at* http://www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal05.pdf. At this stage in the inquiry, this feature is being used as an initial criterion for distinguishing between programs. Discussion of the features of mediation will be elaborated in greater depth. *See infra* Part III.A.

26. *See, e.g.*, CAL. CIV. CODE § 2923.53(a)(3)(A) (West 2009).

27. *See, e.g.*, CAL. CIV. CODE § 2923.53(a)(3)(B) (West 2009).

the loan,[28] and reduction of the principal amount owed by the homeowner[29] — can benefit both the lender and the homeowner. For the homeowner, the benefits are obvious: modifying the agreement to create terms with which she is able to comply allows her to keep her home and to keep her investment. These arrangements can also benefit the lender: foreclosed homes sell below market value, creating losses for the lender when a home is foreclosed upon and sold. On average, lender losses through foreclosure exceed fifty percent, averaging $124,000 per property in November 2008.[30] In contrast, however, the average lender loss through loans modified by reducing the principal amount owed by the homeowner was $23,610.[31] Because of this, "mortgage servicers and investors as a whole would maximize returns on defaulted mortgages by halting or slowing the addition of unsold homes to the inventory, allowing demand to reach equilibrium with supply so that homes could be sold at optimal prices."[32] This reality has created strong incentives, encouraging lenders and homeowners to come together and arrive at mutually beneficial agreements outside of the foreclosure process.

B. CLASSIFYING THE PROGRAMS

1. *Contact-Only Programs: Not Mediation at All*

The current foreclosure mediation dialogue considers any program that requires some contact between the lender and the cred-

28. *See, e.g.*, CAL. CIV. CODE § 2923.53(a)(3)(C).

29. *See, e.g.*, CAL. CIV. CODE § 2923.53(a)(3)(D).

30. Alan M. White, *Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modifications*, 41 CONN. L. REV. 1107, 1119 (2009). Professor White maintains a Web site where this data is updated. *See* Alan M. White, Data Files, http://www.valpo.edu/law/faculty/awhite/data/index.php (last visited July 25, 2010). In November 2009, the average loss for lenders in home foreclosures had risen to $147,880; in contrast, losses incurred through loan modifications, including write-offs, amounted to an average of $12,394. Alan M. White, November 26, 2009 Columbia Collateral File Summary Statistics, http://www.valpo.edu/law/faculty/awhite/data/nov09_summary.pdf.

31. White, *supra* note 30, at 1119.

32. *Id.* at 1111. It is worth noting, however, that at present there is virtually no reliable data about whether loan modifications present workable long-term solutions that allow homeowners to keep their homes and continue making payments to lenders under the modified agreements. Collecting such data would be extremely useful in determining both the success of the programs as well as devising an overall strategy and approach for lowering the number of foreclosures generally.

itor — by telephone or in person — to be a mediation program, regardless of whether the program incorporates intervention by a third party. These programs, however, do not fall within the legal framework for mediation. The Homestead Foreclosure Mediation Program of Florida's Twelfth Judicial Circuit,[33] for example, requires that a lender initiate a "Conciliation Telephone Conference" within 45 days of service of process "to have an open and frank discussion about the alleged default and to consider realistic alternatives."[34] While this step is required for foreclosing lenders, homeowners may choose to opt out of participation.[35] In the Conciliation Telephone Conference, it is the responsibility of the lender to arrange "for the participation of knowledgeable persons, including attorneys, loss mitigation staff, and others who can confirm the amount and type of default, and who are authorized to make binding commitments regarding alternatives to litigation."[36] However, there are no requirements for the presence of a neutral third party to aid negotiations.

Similarly, the California program stipulates that the "mortgagee, beneficiary, or authorized agent shall contact the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure."[37] The borrower has the right to request a subsequent meeting for negotiations.[38] For properties that are covered by the statute, any notice of default filed "shall include a declaration that the mortgagee, beneficiary, or authorized agent has contacted the borrower [or] has tried with due diligence to contact the borrower as required by this section."[39] However, this step does not require the presence of an additional party to oversee or assist in the negotiations between the homeowner and the lender.

Some contact-only programs place the burden on the homeowner to request contact with the lender, if she so desires. Under

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33. Twelfth Judicial Circuit of Fla., Administrative Order Establishing Circuit-Wide Homestead Foreclosure Conciliation Program, A.O. 2008-15.1 (Dec. 1, 2008), *available at* http://www.manateeclerk.org/Portals/0/PDF/AO-2008-15.1.pdf.

34. *Id.* at 2.

35. *Id.* at 1. Homeowners may decline to participate in the program if they so desire. Lenders, however, must participate if the homeowner does not decline the program.

36. *Id.* at 3.

37. CAL. CIV. CODE § 2923.5(a)(2) (West 2009).

38. *Id.*

39. CAL. CIV. CODE § 2923.5(b) (West 2009).

Indiana law, a complaint must include notice that the borrower is entitled to request a settlement conference with the lender.[40] If a borrower makes such a request, the court will order the participation of both parties.[41] The purpose of the conference is to attempt to negotiate a "Foreclosure Prevention Agreement."[42] Thus, the statute does not provide for the oversight of the conference by a neutral third party; indeed some counties specify in their procedural rules that the parties must be prepared to negotiate without oversight.[43]

While these programs certainly may allow for greater communication between the parties and could lead to beneficial outcomes, they simply do not constitute mediation programs because a neutral third party does not facilitate the negotiation process as defined by the ABA structure of mediation.[44] Because of this, these programs cannot be evaluated using the same criteria employed to evaluate mediation programs. Since they cannot be evaluated as mediation programs, contact-only programs are excluded from further analysis in this Note.

2. *Facilitated Conferences: Candidates for Mediation*

The majority of the programs created in response to the inundation of foreclosures do provide for facilitation by a third party, thus making it possible to evaluate them as mediation programs based on their structure. These are the types of programs that this Note considers, and some examples are described below in order to illustrate the landscape underlying the discussion that follows.

A small number of jurisdictions require a facilitated conference in foreclosure cases. One example is the program implemented by Florida's Eighteenth Judicial Circuit under which all residential mortgage foreclosures filed are automatically referred

40. IND. CODE § 32-30-10.5-8(c) (2009).
41. IND. CODE § 32-30-10.5-10(a)(1).
42. *Id.*
43. *See, e.g.*, MARION COUNTY CIR. & SUP. CT. LOCAL R. 231 § 1(b), *available at* http://commercialforeclosureblog.typepad.com/files/lr49-tr85-rule-231.doc. Marion County, Indiana contains Indianapolis.
44. *See* AMERICAN BAR ASS'N, MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 25.

to mediation by administrative order.[45] Such cases must be scheduled for mediation before they can be scheduled for any final hearing, including summary judgment.[46] In addition, "[l]enders are encouraged to enter into pre-suit mediation to expedite the process which may result in the filing of fewer foreclosure actions."[47] Thus, mediation is both encouraged before filing and required after filing.

In the majority of programs, facilitated conferences are available but are not required. Under the Foreclosure Mediation option of New Mexico's First Judicial District — which functions under the district's Alternative Dispute Resolution system[48] — either party can request a referral to foreclosure mediation. Upon receiving this request, the court will appoint a mediator, issue an Order of Referral to Foreclosure Mediation, and convene mediation within 30 days of the entry of the order.[49] Under some systems, requesting to participate in the mediation program can involve a more complex procedure: under both New Jersey's statewide Foreclosure Mediation Program[50] and Allegheny County's Residential Foreclosure Program in Pennsylvania,[51] homeowners who wish to participate in mediation call a hotline, are assigned to housing counselors, and are referred to mediation services through those counselors.[52] In New Jersey, formal mediation is only available after out-of-court negotiations fail.[53] And in Delaware's Residential Mortgage Foreclosure Mediation Pro-

45. Eighteenth Judicial Circuit of Florida, Mandatory Mediation Circuit Court Brevard County Owner Occupied Residential Mortgage Foreclosure, A.O. 09-14-B (Amended) (Feb. 25, 2009), at 2, *available at* http://www.flcourts18.org/PDF/Foreclosures_Brevard/09-14-b%20amd.pdf.

46. *Id.*

47. *Id.* at 4.

48. First Judicial District Court of New Mexico, Foreclosure Mediation ADR Option para. 5(A), A.O. 2009-00001 (Apr. 30, 2009), *available at* http://www.firstdistrictcourt.com/Forms/pdf/ADR-No.2009-01.pdf.

49. *Id.* at paras. 5(A)–(C).

50. *See* Press Release, Office of the Attorney Gen. of N.J., Statewide Mortgage Foreclosure Mediation Program Launched (Jan. 9, 2009), *available at* www.nj.gov/oag/newsreleases09/pr20090109a.html.

51. Fifth Judicial Circuit of Pennsylvania, Mortgage Foreclosure Program, http://www.alleghenycourts.us/civil/foreclosure.asp (last visited July 25, 2010).

52. Mediations taking place within Allegheny County are called "conciliation conferences" and are presided over by a judge. *Id.*

53. Office of the Attorney Gen. of N.J., *supra* note 50.

gram, the process is more complex still: qualifying homeowners[54] can elect to participate in the program by meeting with a HUD-certified counselor to create a "good faith proposal under which the Homeowner can reasonably sustain monthly mortgage payments" and submitting an intake form[55] to the lender's attorney and Delaware Volunteer Legal Services within 15 days of the notice of foreclosure posting.[56] Only after completing these steps will the case be scheduled for mediation.[57]

The description of these existing foreclosure programs — including those being excluded from consideration by this Note — provides the necessary context for understanding the programs as mediation programs. The following section develops the concept of mediation as a unique form of dispute resolution.

III. PRESERVING THE AIMS OF MEDIATION IN COURT-CONNECTED PROGRAMS

Even after eliminating a large subset of programs from consideration in this Note, a diverse group of programs remains. But are these programs truly mediation programs? What does it mean to define a program as a mediation program? In recent years, many so-called mediation programs have begun to take on the features of traditional judicial settlement conferences, often making the two indistinguishable from one another. This section discusses the merging of court-connected mediation and judicial settlement conferences in practice and argues for the need to maintain a distinction between the two forms of dispute resolution.

54. The requirements of the program are described in Superior Court of the State of Delaware, Residential Mortgage Foreclosure Mediation Program, No. 2009-3, para. 4 (Aug. 31, 2009) [hereinafter Residential Mortgage Foreclosure Mediation Program], *available at* http://courts.delaware.gov/Superior/pdf/Administrative_Directive_2009-3.pdf.

55. Copies of the form are available online. *See id.* at 10–12.

56. Residential Mortgage Foreclosure Mediation Program, *supra* note 54, paras. 2–5.

57. *Id.* at para. 4.

A. MEDIATION AND THE COURTS: UNDERSTANDING THE TENSION

"Mediation" refers to a specific form of alternative dispute resolution with goals and benefits that the judicial process does not capture. In contrast with a judicial process, commentators argue that mediation has the "capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."[58] Mediation

> has several capacities that courts lack. It can empower the parties to work together in a respectful and productive manner; allow a focus on the parties' real needs and interests, in addition to their legal claims; offer a flexible process customized to fit the parties' situation, emotions, and interests; and encourage the development of a range of creative and responsive outcomes.[59]

Similarly, the Model Standards of Conduct for Mediators adopted by the American Bar Association in 2005 state: "[m]ediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired."[60] In short, these sources point to mediation as a form of conflict resolution that allows for self-determination: the parties define the problem and craft a resolution in terms of their individual needs and desires, outside of the pre-existing framework of legal issues and remedies.

What happens, then, when the mediation occurs "in the shadow of the courthouse"?[61] In the mortgage foreclosure programs

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58. Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 403 (2004–2005) (internal quotation marks omitted).

59. Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 869 (2008).

60. AMERICAN BAR ASS'N, MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 25.

61. Riskin & Welsh, *supra* note 59, at 864.

described above, cases are referred to mediation after a legal process has already been initiated.[62] Does a looming legal outcome truly allow for individualized notions of justice crafted to meet particular situations, or will any dispute resolution in this context become no more than a settlement conference? In theory, the unique aims of mediation and the extra-legal framework that it aspires to employ differentiate mediation from judicial settlement conferences. In practice, however, the distinction between the two has become less clear.

B. UNDERSTANDING THE DYNAMICS OF JUDICIAL SETTLEMENT CONFERENCES

In order to examine the relationship between mediation and settlement conferences, it is necessary to define the term "settlement conference." This Note focuses specifically on judicial settlement conferences, or settlement conferences overseen by a judge or judicial officer.[63] Yet arriving at a specific definition of what comprises a judicial settlement conference is difficult, due mostly to the lack of uniform regulations regarding these processes: "While judicial settlement conferencing is here to stay, far too often it is undertaken with unbounded, unbridled, and virtually unfettered trial court discretion."[64] Despite the lack of overarching guidelines, however, there are two core characteristics that the judicial settlement conference models appear to share.

First, courts rely on settlement in general and judicial settlement conferences in particular, to manage their heavy caseloads:

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62. In judicial foreclosure states, the legal process is initiated by filing a complaint in a court. In non-judicial foreclosure states, though the process is not initiated before a court, the process for auctioning a home is generally prescribed by statute and can be countered by an injunction by the homeowner. Thus, under either foreclosure regime, the point at which mediation occurs is after the initiation of a legal action.

63. Though parties to a case certainly can and do meet to discuss settlement without judicial oversight, this Note takes the position that only those overseen or directed by a third party are likely to be conflated with mediation. Indeed, facilitation by a neutral third party is the preliminary characteristic used in this Note to distinguish non-mediation programs from possible mediation programs. Thus it is most useful to concentrate on the distinction between judicial settlement conferences and mediations which, in form, may appear very similar.

64. Jeffrey A. Parness, *Improving Judicial Settlement Conferences*, 39 U.C. DAVIS L. REV. 1891, 1891–92 (2006). Parness goes on to argue that judicial settlement conferences should be improved by providing more formality and stricter guidelines. *Id.* at 1898–1908.

"if not for the resolution of cases by settlement, there would not be enough judges or days in a year to try the cases not disposed of by motion."[65] Thus the judicial settlement conference facilitates agreement between the parties outside of the courtroom, thereby relieving judicial dockets.

Second, the judicial settlement conference is characterized by a narrow definition of the problem, focusing on the monetary value of the parties' legal claims and defenses through predictions of possible legal outcomes. The narrow problem definition asks, "First, what would happen if the parties litigated this case? Second, how much is the defendant willing to pay and the plaintiff willing to accept to avoid the delay, risks, and costs of trial?"[66] One judge's guide to practitioners approaching judicial settlement conferences similarly emphasizes that scheduling a settlement conference under the pressure of looming legal deadlines is more effective than settlement conferences without this pressure: "[t]he presence of firm dates enables counsel to discuss with their clients the likely expense and litigation risks which each of those dates hold and imposes a reality check into the settlement process."[67] The same judge requires plaintiffs in settlement conferences to deliver a written itemization of damages to the defendant.[68] These steps emphasize the primacy of the legal backdrop, legal claims, and likely legal outcomes — as well as their monetary value — to effective negotiation in a judicial settlement conference. This framework stands in contrast to the mediation framework described above, which emphasizes individualized notions of justice in particular conflicts rather than relying solely on the monetary value of legal claims.[69]

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65. David A. Katz, *Mediation — A Judge's Views on Judicially Monitored Settlement Conferences*, 35 LITIG. 3, 3 (2009).

66. Riskin & Welsh, *supra* note 59, at 866.

67. Morton Denlow, *Steps to an Effective Settlement Conference: Before You Come to the Table*, PRETRIAL PRACTICE & DISCOVERY (ABA Section of Litigation's Pretrial Practice & Discovery Committee, Chicago, Ill.), Fall 1997, *available at* http://www.abanet.org/litigation/tips/. Magistrate Judge Denlow, of the United States District Court for the Northern District of Illinois, has held various legal instruction positions and has published an array of practice-oriented guides. *See generally* Justice Denlow's curriculum vitae, *available at* http://www.ilnd.uscourts.gov/Judge/DENLOW/vitae.htm (last visited July 25, 2010).

68. Denlow, *Steps to an Effective Settlement Conference*, *supra* note 67.

69. While some might characterize foreclosure as a purely economic problem for which mediation is ill-suited, this Note takes the position that mediation's process aims are valuable in and of themselves and that any dispute has a range of possible outcomes

C. COMPLICATIONS IN PRACTICE: MEDIATIONS AND SETTLEMENT CONFERENCES MERGE

Despite the disparate goals and structures of mediation and judicial settlement conferences, the distinction between the two has become less clear in practice. The policy aims of court-connected mediation programs, for example, often include the conservation of scarce judicial resources — one of the dominant aims of judicial settlement conferences. Indeed, this policy aim has been adopted by many of the foreclosure mediation programs themselves.[70] Thus, even though the core aspirations of mediation — highlighting the right of self-determination by the parties and individualized notions of justice and fairness — are distinct from the efficiency aims of judicial settlement conferences, the background policy concerns leading to their implementation have proved to be identical in certain instances of court-connected mediation programs.

In addition to these background policy aims, commentators have argued that court-connected mediations often deviate from some of the central promises of mediation in ways that make the mediations look more like settlement conferences. This is particularly true in regards to the view of self-determination, which is central to mediation's definition. Professor Nancy Welsh[71] argues that court-connected mediations reflect a narrowed vision of self-determination. The view of self-determination behind the initial mediation movement, according to Welsh, was one in which the disputants themselves "were the principal actors and creators within the process" such that "at the conclusion of a mediation, the parties would feel that the agreement they reached was their

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that represent different values. This set of values includes but is not limited to the economic concerns themselves. Because of this, it is up to the parties to determine how and to what degree economic considerations affect the ultimate resolution of the foreclosure dispute as they define it.

70. In the context of foreclosure mediation programs, for example, the policies furthered by the jurisdictions that have implemented these programs include the efficiency-oriented goal of staunching the flow of foreclosure cases that have inundated the court system.

71. Professor Welsh is a preeminent scholar in the field of alternative dispute resolution. Her broad-ranging work focuses extensively on court-connected mediation. She is former Chair of the ADR section of the American Association of American Law Schools and is currently a member of the Governing Council of the ABA Section of Dispute Resolution.

own."[72] Through participation in every aspect of the mediation process — from communicating in negotiation and choosing the substantive norms employed in decision making, to ultimately deciding whether the dispute would be settled in mediation — the parties would truly exercise self-determination in addressing their disputes.[73] Yet in court-mandated mediation, "attorneys are likely to do much, if not all, of the talking,"[74] and the definition of self-determination is often reduced to whether the parties entered into an agreement freely in purely contract terms.[75] Thus, the view of self-determination originally motivating mediation as an alternative to litigation has, in many cases, been narrowed into asking simply whether the parties have freely contracted in terms of the outcome — a view much more consistent with the settlement-conference model.

This narrowed conception of self-determination leads to narrowed problem definitions in mediation, again pushing these mediations toward the judicial settlement conference model in practice. Professors Leonard Riskin[76] and Nancy Welsh argue that "the majority of court-oriented, non-family civil mediations employ the same narrow problem definition that typically prevails in lawyers' negotiations of ordinary cases."[77] As opposed to empowering the parties to define the problem in an individualized way based on their particular notions of justice, they note that "lawyers, not the clients, dominate the discussions that take place in most mediation sessions"[78] and that "settlement-focused caucuses dominate most mediations rather than joint sessions designed to promote the parties' mutual understanding."[79] To illustrate, Riskin and Welsh cite an empirical study of court-connected mediations in medical malpractice cases that found

72. Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 8 (2001).

73. *Id.*

74. *Id.* at 25.

75. *Id.* at 60–61.

76. Professor Riskin has published extensively on the subject of dispute resolution and mediation, with specific emphasis on mindsets for approaching mediation. He conducts training workshops on mediation, advanced mediation, mediation advocacy, and negotiation for courts, government agencies, and other organizations.

77. Riskin & Welsh, *supra* note 59, at 874.

78. *Id.* at 875.

79. *Id.* at 876.

that "[t]he lawyers generally believed that the purpose of the mediations was to try to settle the case through a monetary agreement, or . . . to encourage the plaintiff to abandon the claim."[80] The study found that lawyers opposed the participation of physicians in mediation sessions because "their presence could invite an emotional dimension that might interfere with settlement."[81] The intentional exclusion of the emotional dimension from mediation suggests a very narrow problem definition focusing on monetary values, and stands in stark contrast to the view of mediation that intentionally engages the parties' emotions and desires and seeks to reorient the parties in relation to one another.[82] Thus, the settlement-focused and lawyer-dominated mediation sessions begin to take on the tenor of judicial settlement conferences.

While mediations begin to look more like settlement conferences, judicial settlement conferences have simultaneously begun to take on characteristics traditionally associated with mediation; thereby further blurring the distinction between the two models. One judge highlights the values of individual participation and satisfaction that are purportedly achieved through the settlement conferences he oversees: "[a]t a settlement conference [the disputants] have the opportunity to observe, ask questions and participate in decisions which affect them . . . client participation in this process gives them a better understanding and appreciation for our system of justice."[83] He argues that when the disputants "successfully work out a solution to a thorny problem, they walk away with a positive feeling towards the court and their counsel."[84] In addition, judicial settlement conferences can be "more controlled by participants"[85] than litigation, and can provide greater flexibility in approaching the problem by creating a "more meaningful opportunity for input from other interested persons, including those not formally joined as parties in the relevant civil litigation."[86] Thus the judicial settlement conference

80. *Id.* at 894–95 (citing Tamara Relis, *Consequences of Power*, 12 HARV. NEGOT. L. REV. 445, 472–73 (2007)).
81. Riskin & Welsh, *supra* note 59, at 895 (citing Relis, *supra* note 80, at 461).
82. *See* discussion *supra* Part III.A.
83. Denlow, *Steps to an Effective Settlement Conference*, *supra* note 67.
84. *Id.*
85. Parness, *supra* note 64, at 1901.
86. *Id.*

can present the opportunity for parties to approach and work through their disputes in a participatory manner within a context that allows for flexibility and promotes feelings of fairness. This view of settlement conferences moves toward the aims of mediation and away from the strictly bottom-line approach of traditional settlement conferences.

It is perhaps unsurprising, then, that in practice the two processes have in some circumstances become inextricably intermingled. As judicial settlement conferences incorporate some of the values of mediation and court-connected mediation programs begin to function more like settlement conferences, courts have in many instances begun to treat them as identical procedures. Many courts, for example, "promote [mediation] in the belief that, overall, settlement saves time and money and produces better results than trial . . . . Indeed, courts generally see settlement as an absolute necessity to process all their cases, and judges often look to mediation as a way to relieve caseload pressures."[87] This observation suggests that courts often view mediation as simply a way of forcing a traditional settlement conference. Likewise, publications directed toward legal practitioners demonstrate a similar attitude: in his article enthusiastically endorsing the judicially overseen settlement process as a fair and effective method of dispute resolution, Judge David A. Katz admits to "us[ing] the terms 'mediations' and 'settlement conferences' interchangeably"[88] and advocates for a species of mediation overseen by a judge with the goal of settling the case.

D. DEMARCATING MEDIATION'S SPACE IN THE DISPUTE RESOLUTION FIELD

The above discussion begs a crucial question: what is the practical significance of the merging of mediations and judicial settlement conferences? One might argue that this merging is advantageous: the fluidity of the programs may provide a necessary flexibility, and the new dimensions added to settlement conferences speak to the success of mediation in introducing new val-

87. John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 123–24 (2002).

88. Katz, *supra* note 65, at 3.

ues into the existing legal frameworks. Despite these apparent positive aspects, this section explains how the merging of mediations and judicial settlement conferences is problematic in practice.

While it is indeed true that having multiple models of dispute resolution to meet diverse needs is a positive outcome, it is still vital that a system that purports to be mediation maintain the features of mediation. If mediation programs are allowed to simply *become* settlement conferences, the mediation system runs the risk of losing the distinctive values it introduced to the system, thereby eroding the gains that proponents of mediation have made in recent decades. Professors Lela Love[89] and Kimberlee Kovach[90] articulate this point in relation to evaluative and facilitative mediation,[91] yet the analysis is equally applicable to the mediation-settlement conference area:

> Mediation belongs to a different paradigm, a different genus, of dispute resolution processes than the adversarial processes where the neutral decides. If the distinction between paradigms becomes dim, it is likely we will slide back to having the options of litigation and lawyer negotiated settlements . . . . Should the mediation process become engulfed by the adversarial paradigm now, disputants will be robbed of one of the richest opportunities to experience collaborative approaches to problem solving and dispute resolution.[92]

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89. Professor Love is an expert in the dispute resolution field and serves as a mediator, arbitrator, and dispute resolution consultant in a broad variety of cases. She sits on the ABA Dispute Resolution Council and the New York State Unified Court System Alternative Dispute Resolution Advisory Committee.

90. Professor Kovach is a leading mediation scholar and practitioner. She formerly chaired the American Bar Association Section of Dispute Resolution, as well as the State Bar of Texas ADR Section.

91. For greater discussion on the evaluative-facilitative debate, see *infra* Part IV.C.2.

92. Lela P. Love & Kimberlee K. Kovach, *ADR: An Eclectic Array of Processes Rather than One Eclectic Process*, 2000 J. DISP. RESOL. 295, 306 (2000). Love and Kovach continue:

> A range of processes will promote different values and allow for refinement of different paradigms and skill sets. Let one hundred flowers bloom!
>
> However, allowing an eclectic mix of neutral activities to all be deemed mediation creates a process which is amorphous and rudderless. Let the hundred

In addition, maintaining the identity of mediation as distinct from settlement conferences provides uniformity that is necessary to the integrity of the field. It ensures that "[w]hen attorneys advise clients about the advantages and disadvantages of mediation, when courts and institutions create mediation programs and panels of mediators, when consumers go to the Yellow Pages to find a mediator, they [ ] know what they are getting."[93] Properly labeling a process creates a context in which professionals are held to accepted ethical standards that are understood in the field, ultimately allowing for "integrity, disputant satisfaction, and uniform practice."[94] For these reasons, it is necessary that a process that calls itself "mediation" be imbued with the characteristic features of mediation and bear distinction, in both theory and practice, from a judicial settlement conference.[95] With this framework firmly in place, this Note proceeds to examine the foreclosure mediation programs and some key features necessary to enable them to deliver on the promises of mediation.

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flowers keep their distinct qualities, even though we may create some beautiful hybrids.

Id. at 306–07.

93. Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 947 (1997).

94. *Id.* at 948.

95. This does not, however, preclude the creation of hybrid programs that are explicitly labeled as hybrids. Hybrid mediation-settlement conferences exist that intentionally choose and combine characteristics of the two different dispute resolution models. One such example is Virginia's hybrid Judicial Settlement Conference Program, implemented in 2003, "combin[ing] aspects of facilitative mediation with judicial settlement techniques." Virginia Judicial System, Judicial Settlement Conference Program: History, http://www.courts.state.va.us/courtadmin/aoc/djs/programs/jsc/history.html (last visited July 25, 2010).

Developed by retired circuit court judges trained in leading both settlement conferences and mediations, the program was created in response to a "need to balance, on the one hand, the demand for case-evaluation services by attorneys representing clients in circuit court cases and their interest in having lawyer-mediators provide evaluative services and, on the other, the facilitative model that has been certified and promoted in the courts . . . ." Geetha Ravindra, *Virginia's Judicial Settlement Conference Program*, 26 JUST. SYS. J. 293, 299 (2005).

In Virginia's program, the settlement conferences are overseen by retired judges. While these judges receive training in mediation and utilize facilitative techniques, "the program evolved not from the state's mediation laws and rules, but out of Virginia Supreme Court Rule 1:19, which provides for a final pretrial settlement conference." *Virginia's Hybrid Court Program Combines Mediation and Settlement Conferences*, 22 ALTERNATIVES TO HIGH COST LITIG. 181, 181 (Int'l Inst. for Conflict Prevention & Resolution, New York, N.Y.), Nov. 2004. This program represents an intentional hybrid between the mediation and strict settlement conference models, demonstrating the fluidity of the frameworks in the current judicial system.

IV. PRESERVING THE HOMEOWNER'S RIGHT TO SELF-DETERMINATION IN FORECLOSURE MEDIATIONS

As described above,[96] the right to self-determination is one of the hallmarks of mediation as a method of dispute resolution and is central in multiple visions of mediation. This Note, therefore, concentrates on this right as a means of ensuring that foreclosure mediation programs stay true to mediation's aims, rendering them distinct from judicial settlement conferences. This section begins by exploring the power disparity between lenders and homeowners before the legal system, arguing that foreclosure mediation systems should provide mechanisms to protect the homeowner's right to self-determination. It then proceeds to enumerate specific mechanisms for safeguarding this right in the foreclosure mediation context.

A. SELF-DETERMINATION AND THE POWER DYNAMIC IN FORECLOSURE MEDIATIONS

In the foreclosure mediation context, the parties are not equally situated in terms of their power in approaching the legal system. In the majority of cases, homeowners are facing the foreclosure system for the first time.[97] Lenders, however, typically see large numbers of cases through the foreclosure process. Thus, homeowners have a single opportunity to seek justice around the high-stakes issue of their homes, while lenders are able to maximize their benefits through the entire set of foreclosure proceedings they may be involved in over the course of several years. Under these circumstances, lenders become "repeat players" who hold an advantage within the existing legal structure of the forec-

96. *See supra* Part III.A.

97. This is particularly true under programs that, like Connecticut's, stipulate that only mortgages securing an owner-occupied residence are eligible for the program. The Connecticut statute states that in order to be eligible "[t]he real property securing the mortgage [must be] a one-to-four family owner-occupied residence, including, but not limited to, a single family united in a common interest community." CONN. GEN. STAT. § 8-265ff(e)(1) (2010). Such parameters essentially ensure that homeowners can only participate in the program one time.

losure process.[98] According to Professor Marc Galanter, who originally developed this terminology, repeat players have the ability to better predict legal outcomes and to maximize their gains over the course of their long-term relationships with the legal system. In contrast, "one-shotters" — in this case, the homeowners — approach the system with fewer resources, especially in terms of expertise, and with a single opportunity to seek justice. This disparity represents a disadvantage in relation to the repeat players within the legal system.[99]

Galanter's analysis suggests that, in response to this disparity, the legal system should "provide more mechanisms so that have-nots (one-shot disputants) become more like repeat players by obtaining repeat player resources in the court system."[100] Viewing the foreclosure process within this framework highlights the need to implement safeguards to protect the rights of homeowners in foreclosure mediations. This need is underscored when one takes into account that mediation is designed to allow the parties to develop "a mutual trust and understanding that will enable the parties to work out their own rules."[101] A mediation program must, therefore, bring the parties together on grounds where they will be able to cooperate. Thus the context of foreclosure cases — in which the lender is systematically advantaged and the homeowner disadvantaged — coupled with the need for collaboration between the parties in order for a mediation to be successful, calls for equalization of the power differential between the parties and therefore additional safeguards for homeowners' rights.

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98. *See generally* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974). Galanter develops and explores the role of "repeat players" in the justice system in this seminal essay.

99. *Id.*

100. Michael Z. Green, *Tackling Employment Discrimination with ADR: Does Mediation Offer a Shield for the Haves or Real Opportunity for the Have-Nots?*, 26 BERKELEY J. EMP. & LAB. L. 321, 339 (2005). Green's article applies Galanter's analysis to representing employees in mediation regarding employment discrimination, much in the same way this Note seeks to do regarding homeowners in foreclosure mediation.

101. Lon L. Fuller, *Mediation — Its Forms and Functions*, 44 S. CAL. L. REV. 305, 326 (1971).

In addition, the mediation process in general has been recognized as being a particularly effective space for minimizing power disparities between the parties in order to maximize cooperation:

> Because mediators control much of the process and can comment on each party's position, they are particularly well placed to discourage raw power plays, emotional outbursts, and deceptive ploys . . . . [M]ediators often can help weaker parties understand the power they actually possess, thereby enhancing their leverage in the negotiation.[102]

These features of mediation serve to equalize the power disparities that may exist between the parties.[103] Thus, the stance of this Note — which focuses on mechanisms to protect homeowners in the foreclosure process in light of the repeat-player advantage — fits within a greater discourse that recognizes the ability to equalize power dynamics as a strength of mediation in general.

B. SELF-DETERMINATION AND COURT-CONNECTED MEDIATION PROGRAMS

One of the most crucial moments in which a party can exercise self-determination in mediation is in choosing whether to enter the mediation process at all. Existent foreclosure mediation programs differ in terms of the parties' abilities to make this choice. In the majority of mediation programs — including those in New Mexico, Delaware, Connecticut, and New Jersey — homeowners may opt into the mediation program after being served with a foreclosure summons and complaint. Yet in some other programs — including those implemented by Florida's First, Eleventh, and Nineteenth Judicial Circuits, and Maine's statewide program — referral to mediation is automatic either upon service of process or upon the homeowner's answering the complaint. In the latter programs, therefore, the homeowner does not actually choose to

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102. Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 104 (2000).

103. The success of the mediation process in accomplishing this aim will depend on a number of factors, including the skills and training of the mediator as well as the parties' positions and willingness to cooperate. Thus mediation may not always serve to equalize power differentials but may be a particularly fertile environment for this endeavor.

enter the mediation program. Even in the opt-in programs, however, the court's role in promoting and encouraging mediation could potentially be perceived by the homeowner as an order from the court system to participate in mediation.

The lack of choice — actual or perceived — presents the possibility of coercion of homeowners to mediate their cases, potentially undermining the value of self-determination so crucial to mediation. Various scholars have addressed the danger of coercion associated with court-connected mediation in multiple contexts.[104] Depending on the context, coercion to participate in mediation can be either implicit or explicit, taking forms such as direct orders by a court, referrals by judges who state that negative consequences will follow if the parties do not undergo mediation, or the use of threatening language in referral documents.[105] While some scholars argue that coercion into mediation does not undermine the right to self-determination in the mediation process itself, others argue that true self-determination requires freedom from compulsion during all stages of the mediation process.[106]

Historically, courts have mandated mediation in response to mediation advocates' claims that parties were not choosing mediation because of unfamiliarity with the process.[107] Given the high levels of satisfaction parties reported regarding the mediation process, courts began to institute pilot mandated-mediation programs that "triggered even greater institutionalization with the development of statewide court-connected mediation in several

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104. Timothy Hedeen — professor, mediator, trainer and former director of various mediation programs — gives an overview of research into this concept in *Coercion and Self-Determination in Court-Connected Mediation: All Mediations Are Voluntary, but Some Are More Voluntary than Others*, 26 JUST. SYS. J. 273, 276–79 (2005).

105. *Id.* at 277.

106. *Id.* at 278–79.

107. Professor Welsh explains:

> Mediation advocates persuaded many courts to give parties the option to submit [substantial civil cases] to voluntary mediation programs. However, few parties chose to exercise this voluntary option.
>
> In response to this lackluster reception, mediation advocates proposed "mandatory" mediation. They argued that courts should have the authority to order parties into mediation. This was inconsistent with the original conception of self-determination, but mediation proponents suspected that parties were not choosing mediation because they (or their attorneys) were simply wary of an unfamiliar process or feared signaling an overeager willingness to settle. Many mediation advocates saw "mandatory" mediation as an opportunity to provide a forced education regarding mediation to attorneys and their clients.

Welsh, *supra* note 72, at 23–24.

states."[108] Thus the current proliferation of court-connected mediation programs stems from a history that acknowledged the potential tension between court-connected or court-mandated mediation and the value of self-determination but, despite this tension, chose to favor the policy aim of encouraging mediation. The existence of these programs, therefore, reflects an overall compromise between the desire to encourage parties to mediate where it is believed mediation would be fruitful, and a desire to preserve pure self-determination in mediation.[109]

Similarly, the policy rationale behind promoting mediation in foreclosure cases justifies action that might appear coercive in other contexts. The scale of the foreclosure crisis is sweeping and unprecedented, and policymakers have been searching for alternative means of avoiding the negative effects of foreclosures on homeowners, communities, and economies.[110] These concerns justify the use of coercion to mediate, so long as the mediation process itself protects the parties' right to self-determination.[111] However, within court-connected mediations, "greater vigilance should be directed toward helping parties achieve voluntary outcomes."[112] The right to self-determination, then, must be protected more forcefully in the mediation room when entry into mediation is less voluntary.

Despite the justifications for mandating mediation and the possibility of adding additional safeguards in the mediation room, a jurisdiction should strive to limit the degree to which automatic referral to mediation coerces parties. One way to limit coercion is to create an "opt-out" system for homeowners. Under such a system, a case would automatically be referred to mediation, but a homeowner would have the choice of not participating in the program after receiving information about how the program functions. By creating a status quo favoring mediation, this type of

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108. *Id.* at 24–25.

109. It is noteworthy that most parties to mandatory mediation report positive experiences with the process: "[t]he simple fact of court-mandated participation in mediation does not appear to reduce parties' satisfaction with the process or their assessments of process fairness." McAdoo & Welsh, *supra* note 58, at 424.

110. *See supra* Part I.

111. *See* discussion of protecting the right of self-determination within the mediation itself *infra* Parts IV.C–D.

112. Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 829 (1999).

program would encourage mediation while still providing homeowners with a degree of agency in deciding whether to enter the mediation process or to continue with the traditional legal proceedings. Another method of limiting coercion is to ensure that homeowners are aware of the point at which they may terminate mediation if they so choose.[113] In order to ensure that homeowners understand the parameters of the process, program rules can explicitly require that parties be presented with this information at the outset of mediation.[114] Such mitigating factors work to preserve the homeowner's right to self-determination in entering a court-mandated mediation process.

C. SELF-DETERMINATION AND LEGAL EVALUATION

In order for homeowners to make informed decisions in the foreclosure mediation process, they must have some knowledge of the likely outcomes of the legal process. Introducing the merits of the legal claims surrounding a case in mediation, however, is a much-debated prospect within the field. This section will explore why such information is critical to a homeowner's ability to exercise the right to self-determination in the foreclosure mediation context, as well as who is best equipped to provide such information in a way that protects the homeowner in the mediation process.

1. *The Importance of Legal Evaluation to Safeguarding the Homeowner*

As described above,[115] one of the main benefits to mediation as a form of dispute resolution is that parties can craft individualized remedies based on individualized notions of justice, rather than through the pre-existing legal norms.[116] Why, then, is the

113. Nolan-Haley argues that in mandatory mediations, "[p]arties must understand that their initial attendance at a mediation session does not imply that they will continue negotiations and reach an agreement." *Id.* at 829–30.

114. Hedeen also proposes that in order to limit coercion in mediation, "mediation consent forms should be executed at the outset of mediation to affirm the disputants' informed consent . . . and understanding of . . . their rights to terminate mediation at any time." Hedeen, *supra* note 104, at 286.

115. *See supra* Part III.A.

116. Though foreclosure might seem to center around economic issues, this does not preclude the benefits of mediation. *See supra* note 69.

homeowner's knowledge regarding outcomes of the legal process necessary to an effective mediation?[117] Professor Jacqueline Nolan-Haley, director of the ADR and Conflict Resolution Program at Fordham Law School, articulates the source of tension in court-connected mediation: "When mediation occurs in court, significant policy questions arise: What happens to law? To justice? Do they collapse in the experience of self-determination?"[118] Because parties approach the justice system seeking legal recourse, when the legal system refers parties to mediation, mediation necessarily occurs under the law's auspices.[119]

What, then, is the role of the law in the mediation room of a court-connected mediation? Nolan-Haley argues that "parties in court mediation have dual tasks: they must be able to understand their legal rights and at the same time be able to acknowledge how their individual and community interests find expression in or outside of these rights."[120] Thus, a legal evaluation provides one piece of information that informs the party's definition of the problem, and facilitates a complete understanding of desirable outcomes overall. The parties in a court-connected mediation must, therefore, have access to information about the possible legal outcomes of their cases in order to exercise meaningful self-determination. It remains within the discretion of the parties themselves, however, to determine how this information will affect their treatment of the dispute, if at all.

The fact that, in the foreclosure context, one-shot homeowners face repeat-player lenders underscores the need for this type of legal evaluation for homeowners. Unlike one-shotters, repeat players have ongoing contact with the legal system and are therefore able to predict legal outcomes with greater accuracy. This ability to navigate the legal terrain provides a framework for bargaining that will inevitably affect the repeat player's approach to negotiation.[121] Indeed, the legal expertise of a repeat player is

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117. "Outcomes of the legal process" refers here to factors affecting likelihood of prevailing on a claim or defense, as well as the possible practical implications of winning or losing a particular claim, including remedies.

118. Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 49 (1996).

119. *Id.* at 63.

120. *Id.* at 66.

121. Much literature has been devoted to discussion of "bargaining in the shadow of the law," or how negotiations outside of the courtroom are influenced by the extant legal

part of what creates the power disparity between the one-shotter and the repeat player.[122] In this context, a legal evaluation provides the one-shotter with information that facilitates her understanding of the repeat player's position. In addition to this, an understanding of the legal background enhances the one-shotter's right to self-determination by ensuring that she has a robust understanding of the possible consequences of diverse negotiated outcomes.

2. *Who Evaluates? Legal Assistance Outside of the Mediation Room*

The introduction of a legal evaluation into the mediation process may raise concerns about how to differentiate the mediation from an adversarial adjudication or a judicial settlement conference in which the judicial officer provides a legal evaluation. These concerns are best addressed by asking a critical question: who should provide the legal evaluation? This Note argues that the legal evaluation must be offered outside of the mediation room, prior to the mediation itself, by somebody other than the mediator.

In order to understand the significance of the "who evaluates?" question, some background on the discourse surrounding mediator evaluation is necessary. The question of whether the proper role of the mediator encompasses providing a legal evaluation of the parties' stances — rather than simply facilitating the conflict resolution process — has sparked a great deal of literature. Proponents of facilitative mediation, in which the mediator "does not give advice and does not provide opinions on the merits of argu-

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framework. In the context of divorce mediation, Professors Mnookin and Kornhausert write, "the outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips — an endowment of sorts" that informs the parties' positions. Robert H. Mnookin & Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979).

122. In discussing power disparities created by uneven information, Adler and Silverstein assert that "[e]xpertise is one of the most critical and powerful sources of information. Those who are viewed as having mastered an area of knowledge can often influence a proceeding by expressing an opinion about a critical point in contention, often without justifying the basis of their opinion." Adler & Silverstein, *supra* note 102, at 27.

ments and the relative value of the case,"[123] argue that evaluative mediation runs a myriad of risks including promoting polarization of the parties, causing the parties to distrust the mediator and therefore disengage from the process, halting negotiation, and detracting from mediation's focus on party responsibility for shaping the outcomes.[124] On the other hand, supporters of evaluative mediation, in which the mediator "gives advice, makes assessments, states opinions — including opinions on the likely court outcome — proposes a fair or workable resolution to an issue or the dispute, or presses the parties to accept a particular resolution,"[125] believe that evaluation can serve an important role in the mediation process. One proponent of evaluative mediation argues that

> [w]ithout sacrificing neutrality, a mediator's neutral assessment can provide participants with a much-needed reality check. Counsel will often look to a mediator to reduce a client's expectations by providing frank assessments of the risk. Parties do not lose trust in mediators or consider them biased because mediators talk frankly with them about their cases.[126]

Thus, some commentators argue, evaluation does not undermine the mediator's neutral role and can serve to move negotiations forward.

Though the evaluative-facilitative discourse is a complex one, the power imbalance of the foreclosure mediation context favors a facilitative mediator. The power imbalance between one-shotters and repeat players magnifies the risks associated with mediator evaluation for the one-shotters. Because of this, any disadvantages caused by evaluative mediation — such as withdrawal from the negotiation process due to mistrust of the mediator, or the risk of error in mediator evaluations — will be felt disproportio-

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123. Murray S. Levin, *The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion*, 16 OHIO ST. J. ON DISP. RESOL. 267, 268 (2001).

124. Love develops these and other themes in her work. *See supra* note 93 and accompanying text.

125. Love, *supra* note 93, at 938.

126. John Bickerman, *Evaluative Mediator Responds*, 14 ALTERNATIVES TO HIGH COST LITIG. 70, 70 (Int'l Inst. for Conflict Prevention & Resolution, New York, N.Y.), June 1996.

nately by the homeowner who does not have long-term contact with the system and who lacks multiple opportunities to maximize benefits. In this situation, then, protection of the homeowner's right to self-determination calls for a facilitative mediator rather than an evaluative mediator: a third party who can enable the parties to resolve their dispute while remaining neutral with regards to the legal issues throughout the mediation process.[127]

In order for a foreclosure mediation program to protect the homeowner's right to self-determination, then, the system must provide a means by which the homeowner can obtain legal guidance prior to the mediation and encourage homeowners to seek such guidance.[128] There are a number of ways in which programs can offer legal guidance. First, a program can allocate funds to provide legal assistance to homeowners who are unable to afford it. The New Jersey legislature has taken this approach, apportioning funds to support the mediation program, some of which have been designated specifically for the provision of legal services to homeowners in the foreclosure process. A second approach — taken by Maine, for example — is to coordinate pro bono attorneys with the mediation program. If these options are beyond the resources of the program, then jurisdictions can provide referrals to pro bono legal services that are not connected to the mediation program itself. This approach — taken by jurisdictions including Connecticut, Ohio's Summit County, and the Florida's Ninth Judicial District — can help ensure that homeowners have access to the legal evaluation critical to their making informed decisions at the mediation table. Because access to a legal evaluation is so critical to maintaining the right to self-determination of homeowners in the foreclosure mediation process, it is crucial that such services be accessible and functional in practice.[129]

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127. This need counsels strongly against mediation by judges, as the judicial role is inherently one of a legal evaluator. In order to avoid the dangers discussed in this section, the parties must be confident that the mediator has no investment in the legal outcome of the case and has no authority to adjudicate it. Mediation by any individual with adjudicatory authority is highly unlikely to provide the parties with the necessary assurances in this regard.

128. The exponential increase in the volume of foreclosures across the nation, see *supra* Part I, brings a correlated increase in the demand for legal services. Because of this, a program may need to take additional steps to ensure that legal evaluation is available to homeowners.

129. Under ideal circumstances, a foreclosure mediation program would ensure that all homeowners could have a legal advocate to assist them through the mediation process.

D. SELF-DETERMINATION AND INFORMATION EXCHANGE

Gaining an understanding of the legal backdrop of the foreclosure claim is not sufficient to protect the homeowner's right to self-determination in mediation. If one fundamental aim of mediation is to allow the parties to craft an extra-legal solution to their dispute, then homeowners must also be able to understand the range of options available to them in negotiating with lenders. In order to do this, homeowners must be able to prepare for the mediation with information crucial to the negotiation process.

Information gaps work to reinforce power disparities in negotiations yet are simultaneously one of the most effective leverage points in equalizing power dynamics:

> [I]nformation power . . . often tips the scales in favor of one party and . . . is the power source most easily increased in negotiations. . . . [Parties] can often obtain information that dramatically changes the negotiation dynamic in a relatively short time. . . . This is particularly critical where decisions must be made quickly with limited resources.[130]

This is especially true in situations such as foreclosure mediations in which an individual confronts an organization in the negotiation process.[131] Requiring information exchange can therefore be a particularly effective and efficient means of adjusting a pre-existing balance of power such as the one in which the lender, as a repeat player, meets the one-shotter homeowner in a foreclosure mediation.

Recognizing that the needs, structures, and — most importantly — resources of each jurisdiction are different, this Note does not provide more specific parameters beyond highlighting the deep significance of these services in guaranteeing the homeowner's right to self-determination in the foreclosure mediation context.

130. Adler & Silverstein, *supra* note 102, at 26.

131. Adler & Silverstein explain that,

> [g]iven the situational nature of power, it should surprise no one that organizations, which by their very nature are hierarchical and interactive . . . , should play as large a role in power dynamics as personal power does. Organizations produce and enhance power for fairly obvious reasons. They provide financial and human resources that vastly exceed those that can be mustered by isolated individuals.

Id. at 24–25.

In addition to providing a mechanism to rectify the general power imbalance between homeowners and lenders in foreclosure mediations, information-exchange systems can function to protect the homeowner's right to self-determination specifically. As Professor Nolan-Haley explains, a party's choice to engage in the mediation process is not the only point at which a party's consent must be obtained. She describes another type of consent, "outcome consent," that must be facilitated during the mediation process.

Outcome consent involves a "decision to accept the agreement that is reached with an understanding of its content, its consequences, and what options are being waived by such consent. This requires sufficient factual and substantive information."[132] She later elaborates, "disclosure and consent requirements should be tailored to the informational needs of individual disputants. What disclosures will enhance this person's ability to understand, define, and decide her dispute?"[133] Meaningful facilitation of the exchange of factual information, therefore, simultaneously helps ensure that parties exercise outcome consent in decision making, thereby expanding the dimensions of their right to self-determination.

Indeed, many of the existing foreclosure mediation programs are structured to ensure an exchange of information to facilitate the negotiation process. In Indiana, for example, lenders must provide specific information including "an itemization of all past due amounts causing the loan to be in default [and a]n itemization of any other charges that must be paid in order to satisfy the full obligations of the loan" upon initiating a foreclosure action,[134] and in Maine, courts frequently request that homeowners provide financial information including proof of income and a list of expenses to the lender's attorney and to the court prior to mediation.[135] The Nevada program requires a similar information exchange. For example, homeowners are required to complete and provide specific financial forms — a Financial Statement and

132. Nolan-Haley, *supra* note 112, at 820.
133. *Id.* at 824.
134. IND. CODE ANN. § 32-30-10.5-10-4(c).
135. State of Maine Judicial Branch, Foreclosure Diversion Program Homeowner Frequently Asked Questions, http://www.courts.state.me.us/court_info/fdp/home_faq.html (last visited Sept. 6, 2010).

Housing Affordability Worksheet — prior to mediation.[136] The lender, in turn, must "produce an appraisal done no more than 60 days before the commencement date of the mediation [of the property] and shall prepare an estimate of the 'short sale' value of the residence that it may be willing to consider as part of the negotiation if loan modification is not agreed upon."[137] Additionally, the Nevada program requires that the parties submit a "nonbinding proposal for resolving the foreclosure" to the mediator under confidential cover prior to the mediation.[138] The exchange of this information facilitates both parties' understanding of the parameters of the legal action as well as a bargaining range, increasing both efficiency and the ability of the parties to make meaningful and informed choices.

Foreclosure mediation programs should provide increased safeguards for homeowners in relation to lenders in the information exchange process. This is due to the importance of meaningful information exchange to the equalization of power imbalances and to the exercise of the parties' rights to self-determination. It is crucial that mediation programs require that the lender provide information to the homeowner prior to the mediation process. As the Maine program requires, lenders should be obliged to provide specific information regarding the homeowner's payment history, including the past due amounts, the principal owed on the mortgage, and the current and projected interest rate, in order to ensure that both the lender and the homeowner have the same information and that the homeowner is able to generate possible alternatives to foreclosure that would meet the needs of both parties. Notably, a number of programs have requirements for provision of information or documents of the

136. NEV. SUP. CT. AMENDED FORECLOSURE MEDIATION R. 7(1), *available at* http://www.nevadajudiciary.us/images/foreclosure/adkt435_amendedrules.pdf. In addition, copies of the discussed forms are available at http://www.nevadajudiciary.us/index.php/viewdocumentsandforms/Supreme-Court-Files/Foreclosure-Mediation/Homeowners/ (last visited July 25, 2010). These forms require information such as employment information, expenses, and assets and liabilities, as well as the reason for inability to satisfy mortgage obligations.

137. NEV. SUP. CT. AMENDED FORECLOSURE MEDIATION R. 7(2), *available at* http://www.nevadajudiciary.us/images/foreclosure/adkt435_amendedrules.pdf.

138. NEV. SUP. CT. AMENDED FORECLOSURE MEDIATION R. 7(3), *available at* http://www.nevadajudiciary.us/images/foreclosure/adkt435_amendedrules.pdf.

homeowners but not of the lenders.[139] This disparity exacerbates the disadvantage to homeowners in the foreclosure mediation process and threatens to undermine the homeowner's right to self-determination by placing information crucial to his informed decision making outside of his grasp.

In addition to requiring information disclosures by lenders, mediation programs should implement mechanisms to assist homeowners in obtaining and interpreting the relevant information that they control, such as their personal financial information and history with the lender. One way of doing this is by creating access to assistance from knowledgeable entities, such as housing counselors. In the New Jersey program, for example, homeowners served with a notice of foreclosure are provided a toll free number that they can call to be referred to a housing counselor.[140] Similarly, the Delaware Foreclosure Mediation Program requires that homeowners meet with HUD-approved counselors prior to mediation and has established a hotline for homeowners to obtain assistance in completing their worksheets as well as counselor referrals.[141] Even simply providing worksheets for homeowners to use in making calculations on their own, while certainly not a complete solution, can help protect homeowners by facilitating the gathering and interpretation of information to guide their negotiations.[142] Such mechanisms that assist the homeowner in compiling and interpreting the relevant information under her control represent a second means of protecting the homeowner's right to self-determination related to information exchange that should be prioritized by foreclosure mediation programs.

By providing the protections described in this section, foreclosure mediation programs can work to protect the homeowner's

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139. This is true of the mediation programs in Connecticut and Ohio's Franklin County. *See, e.g.*, State of Connecticut Judicial Branch, Foreclosure Mediation Program, Homeowner Frequently Asked Questions, http://www.jud.ct.gov/foreclosure/homeowner_qs.htm (last visited Aug. 3, 2010).

140. Housing counselors assist homeowners in the completion of the relevant documents to prepare for mediation. *See generally* N.J. Judiciary Foreclosure Mediation Program, http://www.nj.gov/foreclosuremediation/ (last visited July 25, 2010).

141. *See* Delaware Foreclosure Mediation Program Mediation Notice, *available at* http://www.deforeclosurehelp.org/media/mediation_notice.pdf.

142. New Mexico's First District Court makes such forms, including the Defendant Homeowner's Information Response, available online. *See* N.M. First Judicial District Court, Forms, http://www.firstdistrictcourt.com/Forms.htm (last visited July 25, 2010).

right to self-determination in the mediation process. Protecting the homeowner's right to self-determination works to equalize the power imbalance between homeowners and lenders as they approach the mediation table and helps ensure that these programs can indeed provide the unique benefits that mediation as a form of dispute resolution offers.

V. CONCLUSION

This Note has identified the following points of leverage that foreclosure mediation programs can exploit to protect the homeowner's right to self-determination throughout the mediation process: (1) maximizing the homeowner's agency in determining the parameters under which she participates in mediation; (2) providing a mechanism for the homeowner to receive a legal evaluation prior to the mediation and by somebody other than the mediator; (3) requiring that lenders provide information to homeowners outlining the parameters of the financial issues; and (4) ensuring that homeowners are assisted in obtaining and interpreting the information that is under their control that will be essential to the mediation process.

Because the right to self-determination is one of the key defining features of mediation, safeguarding this right provides a means to ensure that these mediation programs — negotiations between the lender and homeowner facilitated by a neutral third party — maintain the distinctive features of mediation that allow for its distinctive benefits. It is crucial that programs purporting to be mediations maintain these distinctive characteristics in order to preserve the contributions and integrity of the mediation movement, as well as to uphold the uniformity in the field that benefits both providers of and parties to mediation.

The foreclosure crisis has presented pressing and unprecedented challenges that have incited diverse responses from policymakers. Foreclosure mediation programs intended to facilitate negotiation between lenders and homeowners represent laudable and ground-breaking responses to the stark realities of the economic crisis. Those who design and administer these programs are faced with complex challenges as they work with limited resources in a high-stakes arena involving the coordination of multiple players. While recognizing these realities, this Note has identified means of infusing these programs with protections to

maximize the benefits of mediation in the foreclosure context. As policymakers continue to become more adept at designing and implementing alternative dispute resolution programs, they become better equipped to address the needs and challenges that the future inevitably holds.